Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
IP-Enabled Services	)	WC Docket No. 04-36

COMMENTS OF AT&T CORP.

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INTRODUCTION AND SUMMARY

This is the rare proceeding in which the realities can match the hype – IP-enabled services will generate enormous public benefits in an appropriate regulatory environment. Existing voice-over-Internet protocol ("VoIP") services already offer consumers capabilities that far exceed those of traditional telephone services. VoIP services can provide unprecedented wireline mobility, allowing the consumer to use the service from any location with a high speed internet access connection. AT&T's consumer offer already includes a host of new advanced features, including advanced call forwarding features and "do not disturb" options that enable consumers to program the service so that the phone answers to their needs instead of the other way around. These benefits will only increase as device manufacturers, network owners, service providers and applications developers take full advantage of the ability to integrate voice, data, and advanced computer capabilities.

The IP environment will also allow voice services to be provided much more efficiently. It is well established that IP technology allows for more efficient routing of calls than circuit-switching. And so long as all VoIP providers have equal access to last mile broadband transport networks, competition from multiple VoIP providers will create a "virtuous cycle in which competition begets innovation, which in turn begets more competition." *Notice* ¶ 22. Indeed, a regulatory regime that encourages the development and deployment of VoIP and other IP-enabled services is among the most powerful tools the Commission possesses to stimulate broadband deployment.

VoIP also has the potential finally to eliminate – at least at the retail level – the local telephone monopolies that incumbent LECs have enjoyed for over a century. Current VoIP offerings allow customers that have a broadband connection to place unlimited calls anywhere in the country for a single low price. And that is why, as the Chairman recently stated, the

incumbent LECs might well be "terrified" of VoIP. *Powell Says FCC Is Devising Ways To Deal With 15% Problem*, Communications Daily (May 5, 2004) ("If you're a big incumbent and you sort of enjoy the competitive advantages of being the owner of that kind of service system, you, in my opinion, ought to be terrified [of VoIP]").

But these benefits are by no means certain. Instead, as the *Notice* recognizes, important decisions need to be made – and made now – about what legacy economic and social regulations should be imposed on IP-enabled services. The *Notice* raises many VoIP specific questions, but opportunities for broader reform should not be ignored. Legacy regulatory schemes are, in such key respects as universal service and intercarrier compensation, irreversibly broken and, indeed, no longer make sense even in the context of the traditional circuit-switched wireline telephone services for which they were developed. Prompt Commission attention to these fundamental flaws in existing regulation is urgently needed, and the Commission should take particular care to ensure that IP-enabled services are not burdened with these flawed legacy regulations in the period before reform is completed. In other respects, the transition to an IP-enabled communications world will require heightened Commission scrutiny, particularly at the network level, to protect the open environment that must be preserved if VoIP and other IP-enabled services are to reach their full potential in a truly competitive environment. In moving forward on these critical issues, three basic principles should guide the Commission's inquiry.

First, the "particular statutory classifications" of IP-enabled voice services, while an important step in the Commission's analysis, should not "lead inexorably to any particular regulatory treatment." *Notice* ¶ 43. The Commission must recognize that a service may be classified as an "information" or "telecommunications" service for reasons that simply have no relevance to the underlying purposes of whether a particular set of regulations should apply to

that service. The Commission's ultimate goal should thus be to determine whether application of legacy regulation to an IP-enabled service serves valid economic and public policy goals that do not outweigh the potential burdens of the regulation. The alternative – mechanically linking statutory classifications and particular outcomes – is simply unworkable in a rapidly evolving nascent industry and could deter logical transformations.

Although certain "telecommunications service" and "information service" distinctions are built into the Communications Act itself, Congress has given the Commission broad authority to ensure that the Commission's regulations of IP-enabled services are based on the relevant economic, technical and policy considerations rather than definitional boundaries. For example, no provision of the Communications Act requires interexchange "telecommunications service" traffic to pay access charges; instead; such charges are today imposed only by the Commission's legacy access charge rules to the extent that those rules were "grandfathered" by section 251(g) of the Communications Act. Thus, to the extent that a particular IP-enabled service might otherwise be subject to access charges by virtue of a telecommunications service classification, the Commission has substantial flexibility to expand the existing ESP exemption (or create a new one) to cover that service. More broadly, sections 251(b)(5) and 251(g) expressly contemplate that the Commission will replace its access charge regime with a rational intercarrier compensation regime in which *all* traffic is terminated on a bill and keep or other cost-based approach. *See* 47 U.S.C. §§ 251(g), 251(b)(5), 252(d)(2). With regard to public safety and disability access, the Commission can provide reasonable transition periods in recognition of the fact that technologies and operational arrangements that will be necessary for IP-enabled services to comply with legacy requirements have not yet been developed or perfected. *See, e.g.*,

47 U.S.C. § 255(d) (providing that disability access is to be provided only to the extent that it is "readily achievable").

Second, decisions about the appropriate regulatory treatment of IP-enabled services and facilities are not something that should – or, indeed, rationally could – be attempted categorically or in the abstract. The *Notice* encompasses a wide range of regulations, services and facilities. Whether or not a particular legacy regulation should apply must turn on a reasoned assessment of (i) the purpose and the basis for the regulation and (ii) the potential costs of imposing that regulation (or failing to apply that regulation).

Thus, as explained below, the Commission must be careful to distinguish between those regulations that apply to the "applications layer" – *i.e.*, retail IP-enabled services – and those that apply to the "network layer" – *i.e.*, the broadband transport networks that are required by both users and providers of retail IP-enabled services and applications. Although the preconditions for monopoly at the applications layer might be generally absent, these services – like traditional voice and data service – require access to last-mile transport facilities for which there is generally substantial concentration of ownership. *Notice* ¶ 5 ("The Commission must always be alert and ready to act against anticompetitive risks and discriminatory provisioning by dominant firms that result in consumer harms"). Until that concentration is dissipated, regulation of the facilities layer – regardless of the presence or absence of an IP label – will remain necessary to protect consumers and competition. Among other things, the Commission must ensure that the Internet remains open and that consumers are able to obtain access to the VoIP and other IP-enabled services, applications and devices from the full range of providers, without interference from the entities that currently control last-mile broadband transmission services.

Third, the Commission should strive "to limit[] regulatory uncertainty and unnecessary or unduly burdensome regulatory costs." *ILEC Wireline Classification NPRM* ¶ 5. In categorizing IP-enabled services for regulatory purposes, the Commission should recognize that these services are at an early stage of development and rely on novel and ever-changing technologies. "Regulatory uncertainty and delay can function as entry barriers in and of themselves, limiting investment and impeding deployment of new services."[1] Thus, it is not enough for the Commission to announce broad "principles" in this proceeding; the Commission should strive to apply promptly those principles with specificity to existing IP-enabled services and determine precisely the extent to which existing legacy regulation should, or should not, apply to these services.

The remainder of AT&T's comments apply these basic principles to the specific issues raised in the *Notice*. In Part I, AT&T discusses its own VoIP services and technologies as concrete examples of the extraordinary potential of IP-enabled services. AT&T has invested heavily in IP technology and now offers innovative VoIP services to both residential and enterprise customers that allow customers to make and receive high quality voice calls either exclusively in IP format or to send calls to and receive calls from customers connected to the PSTN. Although these VoIP services deliver capabilities well beyond those provided by traditional telephone services, AT&T continues to invest heavily in network facilities and technologies to expand the features and functionalities of these services and fully leverage the potential of IP technology.

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[1] Remarks by Commissioner Kevin J. Martin, *At the Crossroads*, 20th Annual PLI/FCBA Telecom Conference, Washington D.C. (Dec. 12, 2002). *See also* First Report and Order and Further Notice of Proposed Rulemaking, *Amendment of the Commission's Space Station Licensing Rules and Policies*, 18 FCC Rcd. 10760, ¶ 45 (2003) ("clearly defined" rules "reduces regulatory uncertainty, and so encourages investment").

In Part II, AT&T explains why the Commission generally should not apply legacy economic regulation to the IP-enabled service "applications layer." So long as regulation adequately protects against abuse of market power in the "network layer" – *i.e.*, the broadband network facilities through which consumers access Internet applications – the preconditions for market power in the applications layer are likely to be absent (at least with respect to providers unaffiliated with dominant network owners) and market competition should ensure that consumers obtain IP-enabled services at just, reasonable, and nondiscriminatory terms. In this regard, there is little tension between the regulatory classification that would apply to most VoIP services and the presumptive regulatory structure that would bring. Most VoIP services, including AT&T's VoIP offerings, are undeniably "information services" outside the reach of Title II. *See infra* Part II.A.

At the same time, the emergence of VoIP underscores the urgent need for the Commission to complete reform of its hopelessly broken intercarrier compensation regime. The Commission should, as soon as possible, move away from the system of wildly varying carrier-to-carrier payments for functionally identical transport and termination and toward a uniform rule of bill-and-keep or other cost-based compensation. As an interim measure, the Commission should exempt all VoIP traffic, whether telecommunications service traffic or information service traffic, from access charges. *See infra* Part II.A. To the extent that the Commission has encouraged industry to negotiate reform, applying access charges to VoIP removes the incumbents' incentives to negotiate access reform. By contrast, the interim measure of exempting all VoIP services from legacy access charges will provide appropriate incentives for further industry negotiation toward comprehensive intercarrier compensation reform pending Commission action.

Regulation to protect consumers' societal interests stands on a different footing. AT&T recognizes that as consumers begin to use VoIP services as a substitute for traditional voice services, the Commission (and state commissions) may be interested in extending regulatory oversight of beneficial social services such as 911 and access to persons with disabilities. At the same time, the Commission must be mindful of the unique and nascent nature of IP-enabled service and the revolutionary benefits that they promise. Thus, the Commission should not simply mandate application of legacy regulation without appropriate transition periods necessary to give the industry sufficient time to design and implement the necessary industry standards and adjustments. *See infra* Part II.B.1-2. Optimal development of VoIP services requires that regulation for social concerns be tailored to the distinct technological characteristics of VoIP services, allow for design of industry standards and recognize that this step supports phasing-in regulation over a reasonable transition period. Mechanical application of legacy rules will stifle the very innovation that may better serve important social policy goals such as 911 and access for the disabled.

On the other hand, it should go without saying that the Commission's universal service system requires substantial overhaul. The universal service fund continues to grow while its contribution base continues to shrink. As AT&T and others have explained, the only viable solution is to replace the current "revenues-based" system with a "numbers-based" system. This proposal would also ensure that VoIP providers and providers of traditional telephony services both contribute to the fund in reasonable and nondiscriminatory manner. The Commission should adopt these reforms as soon as possible. *See infra* Part II.B.3.

Because VoIP is disruptive of existing business and regulatory models, its deployment will raise concerns for state regulatory commissions as well as this Commission, both of which

have legitimate interests in the development of the marketplace and genuine concern for the consumer and business interests to be affected by those developments. Given this, the Commission should preempt those state regulations that would have the effect of negating the federal policies that the Commission establishes in this proceeding, but not here attempt to extinguish all role for legitimate state oversight. In particular, as the Commission held in its *Computer Inquiries* proceedings, it should preempt state "common carrier tariff regulation" of VoIP services, and consider the implications for federal policies of state action with regard to 911/E911 and disability access regulations. AT&T recognizes that the states retain an important role in the transition to an IP-enabled environment, but it is critically important that the states and the Commission work together to avoid a patchwork of conflicting and misguided state and federal requirements that could deny consumers the full benefits of VoIP and other IP-enabled services. *See infra* Part II.C.

Part III explains that the Commission must take targeted steps to ensure that networks remain open to all providers of IP-enabled devices, applications and services and to the consumers that wish to use the devices, applications and services of their choice. IP-enabled services will never achieve their full potential if these services are only provided by the entities that currently control last-mile broadband transmission services. Thus, while economic deregulation of VoIP at the application layer is generally appropriate, the Commission must take care to differentiate between the application layer and the network layer, where concentration remains high and the need for limited regulation to ensure openness and deter market power abuse is more needed than ever. *See Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 F.C.C.2d 384, ¶ 219 (1980) ("*Computer II*") ("The importance of the control

of local facilities . . . cannot be overstated. As we evolve into more of an information society, the access/bottleneck nature of the telephone local loop will take on greater significance").

Fortunately, only modest conduct regulation, together with vigilant Commission oversight, is necessary to protect nascent VoIP competition – and the Commission has ample authority to adopt such rules. First, the Commission should forbid any network provider or entity providing Internet access to subscribers from impeding access to the Internet content of another applications or service provider, except where such access would threaten the integrity of the network or where required by law. *See infra* Part III.A. Second, the Commission should broadly prohibit any broadband transport provider from requiring subscribers to purchase any IP-enabled service (or, in the case of incumbent LECs, local telephone service) as a condition of obtaining broadband Internet access service. *See infra* Part III.B. These modest conduct regulations are *not* equivalent to "unbundling" of last mile transport networks and will not prevent transport providers from offering their own innovative bundles of services. Indeed, cable companies have already pledged to maintain open access to their networks.[2]

SBC's separate declaratory order petition should be rejected out of hand. In hopes that the Commission would mindlessly deregulate anything that is labeled "IP," SBC asks the Commission to eliminate all existing regulation that would apply to SBC's *basic transmission services and the underlying facilities used to provide those services* to the extent they are based on IP technology. The Act, of course, does not permit the elimination of core regulatory obligations that apply to basic telecommunications services and facilities simply because they employ Internet Protocol ("IP"). Nor, given market conditions and the very real potential for

[2] Communications Daily (Dec. 19, 2003) ("NCTA Pres. Robert Sachs said the cable industry wouldn't stand in the way of Vonage's riding aboard cable modem lines to provide voice-over-Internet protocol (VoIP) service to cable's high-speed Internet customers.")

market power abuse, is there any serious policy justification for the relief SBC seeks (or for SBC's additional request that the Commission eliminate *Computer Inquiries* obligations relating to "IP networks"). *See infra* Part III.C.

ARGUMENT

I. IN AN APPROPRIATE REGULATORY ENVIRONMENT, IP-ENABLED VOICE SERVICES WILL BRING ENORMOUS PUBLIC INTEREST BENEFITS.

The increased deployment of broadband transport has now begun to unleash the true potential of IP-enabled services. AT&T and others have begun offering VoIP services that provide both voice telephone functionality and enhanced functions far more advanced than the current capabilities of traditional wireline POTS. As described in greater detail below, the AT&T CallVantage service includes advanced call forwarding features, "do not disturb" options, and advanced call management features. Existing VoIP services also offer consumers unprecedented mobility. VoIP subscribers can elect to receive calls to the same number at home, office, or any other location where broadband Internet access is available, and can retain their existing phone numbers even after relocating to another location.

These benefits will multiply in the near future. VoIP is quickly becoming a full-blown "computer" application, limited only by the talents of applications developers. VoIP offers the potential for the full integration of voice, data and advanced computer applications. For example, VoIP would allow an architect to discuss drawings with a client and change those drawings simultaneously, in real time, on a single platform. VoIP also promises to revolutionize the ability of persons with disabilities to make and receive telephone calls. And next generation telephones will allow customers to make telephone calls using VoIP where the customers have wireless Internet access and to access cellular service where they do not.

VoIP will make telephone service cheaper as well as better. IP technology allows for more efficient routing of calls than circuit-switching because IP technology does not require a circuit to be held open when there is little or no information being passed through the circuit. IP technology also allows information to flow over the least congested path – even allowing information in a single call to travel over multiple routes.

AT&T's own business plans exemplify these trends. AT&T has been investing heavily to transform its legacy network to a fully IP-based, integrated network. AT&T's goal is to provide both consumers and businesses the ability to communicate in IP format on an end-to-end basis, thereby maximizing the potential of IP technology. AT&T recognizes, however, that the shift to IP will be gradual, and is working actively to ensure that its IP network and IP-based customers can communicate reliably with subscribers that remain connected to the public switched telephone network ("PSTN").

AT&T's Residential VoIP Service. AT&T CallVantage service is an innovative new IP-based offering that enables customers to place phone calls over the Internet, and send to and receive calls from ordinary POTS subscribers. AT&T CallVantage service customers thus can obtain telephone service wherever they have a broadband Internet connection. AT&T CallVantage service customers are not limited to their "geographic" telephone number, but can obtain numbers from across the United States. AT&T CallVantage service is now offered in 33 major markets in nine states, and will be expanded to over 100 major markets by the end of 2004.

Although the technology used in AT&T CallVantage service is advanced, the offering itself is user-friendly. Customers connect an "ordinary" voice-grade telephone to an AT&T-supplied adapter, and connect the adapter to either a cable or DSL modem. The adapter

converts the customer's analog voice signals into IP packets (and *vice-versa*). AT&T CallVantage service allows the customer to make and receive calls from anyone, PSTN-connected and broadband-connected customers alike.

AT&T CallVantage service offers far more than high quality voice calls at very affordable rates. Not only does it include traditional "vertical features" such as voice mail, caller ID, call waiting and call forwarding, the use of next generation IP technology has allowed AT&T to provide consumers with unique "e-features" not available with POTS service. Among those currently included in AT&T's service are the ability to check voice mail from any phone or computer; the option of sending "talking" emails containing voice mail messages; a real-time call log; a "do not disturb" feature (*i.e.*, call blocking for certain time periods); personal conferencing; and the "locate me" feature, which allows calls to be forwarded to up to five additional numbers. These features and functions only scratch the surface of VoIP's potential. AT&T is in the process of researching and developing new features for its VoIP service that will leverage its existing IP platform to bring additional consumer benefits.

AT&T CallVantage service also gives customers unprecedented control over call management. AT&T CallVantage service customers have the ability to access and change their "e-features" over the telephone or via the Internet. Thus, for example, a customer can adjust the "locate me" call forwarding feature to ring to the customer's current location and modify the application of the "do not disturb" feature. These systems can also be used to check voice mail from any location. And, as AT&T adds new e-features to its VoIP service, it will also develop Internet-accessible management tools that give customers' unprecedented ability to control those features as well.

AT&T is also investing heavily to ensure that its VoIP services provide customers with the same high quality as AT&T's wireline local and long distance offerings. And, because of VoIP's flexibility, AT&T is confident that the industry will ultimately be able to offer VoIP customers *better* public safety and disability access than today's circuit-switched technology offers. These improvements, however, require substantial investment and rigorous research and development by more than just VoIP service providers.

AT&T's Enterprise VoIP Offerings. AT&T is also making significant investments in the research and development needed to integrate VoIP services into its existing offerings for large business customers, and to ensure that its network and services enable business customers to take full advantage of the current and anticipated capabilities permitted by an IP-based communications network. Indeed, developing applications and the supporting network capabilities for business services is likely to be an important driver in the future development of VoIP as a whole, as much or more than the development of retail VoIP services that have captured the Commission's and the public's attention. Examples of such enterprise-generated applications include "one number" (or "follow me") services, instant messaging to any device at any location, interactive call centers, readily available multi-point videoconferencing and virtual meeting capabilities, real-time language translation, and desktop multimedia services.

AT&T is currently adding layers of VoIP and other IP applications to its existing and emerging communications networks and services. AT&T's initial focus has been integrating VoIP capabilities into its existing IP-based network offerings. This has involved upgrading and expanding the capabilities of AT&T's managed Internet services, enhanced virtual private network services, managed router services, and private network transport services. Each of these network services uses different IP-based capabilities to enable businesses to communicate among

multiple sites, integrate various data and voice-based services, interconnect their communications capabilities with external networks (including the PSTN), and enable their employees and others to use remote connections to access the capabilities of the business's communications network.

AT&T is also upgrading its business-related local calling services, by replacing traditional Centrex services with an IP-based Centrex offering, and providing IP-based alternatives to other high capacity local switched services used by business customers. Because the deployment of IP-based Centrex and high capacity local services increases the complexity of coordination between the IP and TDM networks, AT&T is devoting considerable resources to ensuring a seamless interconnection between AT&T's IP network and public and private TDM-based networks, between the customer's own IP and TDM network components, and between the customer's IP network components and external networks. Business customers' installation of these IP-based services permits a business and its employees to sever the link between a particular phone (or related CPE) and a particular location. The customer can use the IP-enabled phone device at any point of access to the customer's IP-based network, and has considerable flexibility to use that device for remote access to the customer's network.

Finally, AT&T is also investing to enhance the capability of IP-based inbound and multiple-party calling. IP-based toll-free calling and call center support will enable businesses to integrate calling capabilities with other databases and customer support systems in a manner that will provide entirely new and superior capabilities for businesses to serve and interact with their current and prospective customers. IP-based teleconferencing will also provide the ability to integrate multi-party voice communications with other IP-based information sharing services that are accessible to large numbers of people simultaneously.

II. THE IP-ENABLED "APPLICATIONS LAYER."

As the *Notice* suggests, the relatively low barriers to entry and the existence of multiple providers of VoIP and other IP-enabled services at the retail applications layer strongly counsel against economic regulation of those developing services. Regulation of entry and access and other charges for service would increase regulatory uncertainty and unduly burden service development. As long as regulation adequately protects against the abuse of market power in the *network* layer, and ensures that market power arising as the result of control over facilities cannot be translated into unfair advantage or market power at the *applications* level, the competitive conditions surrounding IP applications should generally be adequate to protect consumers without the need for economic regulation.

Appropriate regulatory safeguards for the network layer are discussed in Section III of these comments. If adequate protects are in place, application of the Commission's existing regulatory classifications should largely suffice to achieve appropriate outcomes for the applications layer.

The NPRM asks for comment on the need for separate classification and regulation of different types of customer premises equipment, IP-enabled services, and associated applications. Rather than attempt to craft economic regulation in light of particular service characteristics or to pick and choose among emerging services, the Commission already has the tools available to it to craft an appropriately deregulatory regime without arbitrary lines drawn among services: the information services regime should ensure the proper level of regulation in almost all cases. As AT&T's retail and business IP-enabled offerings show, most VoIP and other IP-enabled services offer the capability for net protocol conversion and include other enhancements beyond bare transmission that place them squarely within the information services

classification. However, where the Commission identifies VoIP services that do not squarely fit within the information services regulatory classification, and a telecommunications service classification would otherwise produce unnecessarily stringent regulatory outcomes, the Commission has broad authority to avoid that result – through forbearance, interpretation, waiver or rulemaking. The application of legacy access charges, in particular, should be avoided regardless of the regulatory classification of particular VoIP services.

Social regulation presents different issues. The Commission (and state commissions) have an interest in seeing that VoIP services ultimately respond to legitimate consumer protection concerns that, for traditional telephone services, have led to regulation of 911 services, access for persons with disabilities, and other consumer protection requirements. Mechanical application of those requirements – requirements that were developed for circuit-switched based networks – to VoIP services, however, risks stunting development of new and important services, features and functionalities. Optimal development of VoIP and other IP-enabled services requires that regulation for social concerns be tailored to the distinct technological characteristics of VoIP services, and that some aspects of the regulation be phased in over reasonable transition periods.

A. Economic Regulation Of The Applications Layer Is Generally Unnecessary, But Intercarrier Compensation Reform And An Immediate Access Charge Exemption For All VoIP Services Are Urgently Needed.

The Commission requested comments on whether "economic" regulations that currently apply to telecommunications services should be applied to IP-enabled services. *Notice* ¶ 73. The answer is straight-forward: economic regulation is appropriate only for services where the supplier can exercise market power, by "rais[ing] prices by restricting its own output (which usually requires a large market share)" or "increasing its rivals' costs or by restricting its rivals' output through the carrier's control of an essential input, such as access to bottleneck facilities,

that its rivals need to offer their services." *Regulatory Treatment of LEC Provision of Interexchange* Services, 12 FCC Rcd. 15756 ¶ 83 (1997) ("*LEC Classification Order*"); *see also ITTA Forbearance Petition*, 14 FCC Rcd. 10816, ¶ 7 (1999). Here, the preconditions for monopoly at the applications "layer" are generally absent. So long as the Commission appropriately regulates the underlying facilities needed to provide IP applications, *see infra* Part III, there is every reason to expect that multiple carriers will vigorously compete to offer consumers a wide array of VoIP and other IP-enabled applications. This intense competition should ensure that rates and terms for these services are just, reasonable and nondiscriminatory. To facilitate this competition, however, the Commission must act quickly to complete its intercarrier compensation reform proceeding, and it should not apply legacy access charges to any VoIP services in the interim.

The Commission already has the regulatory authority for appropriately light-handed regulation of the applications layer. Nearly all of the relevant IP-enabled applications at issue in this proceeding should fit within the established category of "information service," which has an appropriately reduced level of regulation of entry conditions, charges, and other economic regulation.

Section 3(20) of the Communications Act, 47 U.S.C. § 153(20), provides that an "information service" is the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." The Commission's rules further provide that any service "which employ[s] computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, provide the subscriber additional, different, or restructured information, . . . or involve subscriber interaction with stored

information," 47 C.F.R. § 64.702(a), are "enhanced" and therefore "information" services. *See Non-Accounting Safeguards Order*, 11 FCC Rcd. 21905, ¶ 102 (1996) (statutory category of "information services" is broader than "enhanced services" but includes everything previously deemed to be enhanced services); *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501, ¶ 33 (1998) ("*Report to Congress*") (same).

AT&T's residential and enterprise VoIP offerings are plainly "information services" within the meaning of section 3(20). For example, AT&T CallVantage service is analogous in all relevant respects to the pulver.com service that the Commission recently found to be an information service. Memorandum Opinion and Order, *Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, FCC 04-27, ¶ 11 (rel. Feb. 19, 2004) ("*Pulver.com Order*"). Like pulver.com, the AT&T CallVantage service offering is a "bring your own broadband" service. *See Pulver.com Order* ¶ 9. AT&T CallVantage service end-users, like pulver.com's, use their own end-user devices (their computers and telephone adapters) to "establish the actual connection" with others through their pre-existing connection to the Internet. *Id.* ¶ 6. Like pulver.com, AT&T CallVantage service facilitates connections to others who are connected to the Internet (so-called "computer-to-computer" communications), and it provides numerous data storage features that allow its end-users to manage these communications. As described above, AT&T CallVantage service provides subscribers a "Personal Call Manager Web Site," which gives subscribers "complete control of all . . . features. At a glance, [you, as a subscriber] can check your voice mail or change any of your settings instantly."[3] Similarly, AT&T CallVantage service includes a "Personal Call Manager" that allows the subscriber to call in and access and

[3] http://www.usa.att.com/callvantage/what/management.jsp.

manipulate a number of service features.[4] AT&T CallVantage service also includes a novel new service that allows customers to check their voice mail from their computer and to "make this information available" to others by giving subscribers the ability to forward this information as a "talking" e-mail.[5] *See Pulver.com Order* ¶ 11 (finding a similar capability was an "information service"); *see also* Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798, ¶ 38 (2002) ("*Cable Modem Declaratory Order*") (providing e-mail capability as part of broadband Internet access service is the offering of an "information service"). The fact that AT&T may provide these information services in part "via" its own "telecommunications" (*i.e.*, over its own IP backbone facilities) does make them any less an information service.

AT&T CallVantage service provides additional information services, of course, that pulver.com does not provide. Most prominently, AT&T CallVantage service provides additional protocol conversion services that allow its end-users to establish communications with others who are still connected to the PSTN. VoIP customers use CPE that originates voice communications in IP format at the point they enter the network. To allow these subscribers to communicate with telephone subscribers that are connected to the PSTN using traditional wireline facilities, AT&T's service includes "computer processing applications" that convert the customer's IP-based communications to the traditional analog format of POTS services.[6] Likewise, when a non-VoIP, circuit-switched POTS customer calls an AT&T VoIP subscriber

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[4] http://www.usa.att.com/callvantage/what/management.jsp.

[5] http://www.usa.att.com/callvantage/what/features.jsp.

[6] Specifically, when a VoIP customer calls a POTS customer, an AT&T server will direct the IP packets to a media gateway which converts the packets into a traditional analog voice call.

(whether enterprise or residential), AT&T converts the call to IP format.[7] The Commission has repeatedly recognized that services that include such net protocol conversions are "information services." *Non-Accounting Safeguards Order* ¶ 104; *BOC Joint Petition for Waiver of Computer II Rules*, 10 FCC Rcd. 13758, ¶ 51 (1995); *Computer III Phase II Order*, 2 FCC Rcd. 3072, ¶¶ 64-71 (1987).[8]

Even if all of this were not the case, the fact that some minority of calls may not involve protocol conversion (*e.g.*, an AT&T VoIP customer calls another AT&T VoIP customer) does not transform AT&T's residential and enterprise services into something other than information services. Section 3(20) provides that a service is an information service so long as it "*offer[s]* . . . [the] *capability* for generating, acquiring, storing, transforming, processing, utilizing, or making available information via telecommunications." (emphasis added). Thus, the Act does not require that "generating, acquiring, storing, transforming, [and] processing" of information be performed each and every time a subscriber uses the service, but only that the "capability" for such "generating, acquiring, storing, transforming, [and] processing" be "offered."

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[7] Telephone numbers for AT&T CallVantage service subscribers need not be associated with the rate center of the customer's service address. An analog voice call to such a phone number is carried to the AT&T node where the local number is assigned. The AT&T node associates the call with the subscriber's IP address. The call is converted to IP format, and is carried over the public Internet to the customer's telephone adapter, wherever it may be physically located.

[8] In that regard, the New York Public Service Commission's recent holding that VoIP services do not involve a net protocol conversion is simply incorrect. *See Complaint of Frontier Telephone of Rochester, Inc. Against Vonage Holdings Corporation*, Case 03-C-1285, Order Establishing Balanced Regulatory Framework for Vonage Holdings Corporation (NYPSC, May 21, 2004). The VoIP end user sends information to the network in IP format, and VoIP providers perform only one protocol conversion (IP to TDM). When assessing whether there has been a net protocol conversion, the Commission has consistently looked at the "outputs of the *network*." *See, e.g., Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, 95 F.C.C.2d 584, 590 (1983) (emphasis added). Customer premises equipment has never been considered part of a provider's network for these purposes. *See also Pulver.com Order* ¶¶ 11-12.

The Commission has likewise repeatedly made clear that when a "comprehensive service offering" includes such data processing capabilities, it is an "information service," "regardless of whether subscribers use all of the [information service] functions provided as part of the service." *Cable Modem Declaratory Order* ¶ 38; *id.* ¶ 35 (statutory definition of information service "rests on the function that is *made available*") (emphasis added). Likewise, in the *Report to Congress*, the Commission made clear that "[i]f the user can receive nothing more than pure transmission, the service is a telecommunication service. If the user *can receive* enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service." *Report to Congress* ¶ 59 (emphasis added); *see also id.* ¶ 58 ("[a]n offering that constitutes a single service from the end user's standpoint" is not a basic telecommunications service "simply by virtue of the fact that it involves telecommunications components"). Here, all of AT&T VoIP residential and enterprise subscribers "can receive enhanced functionality" – *i.e.*, protocol conversion capabilities.

The fact that these services are information services also means that legacy access charges do not and should not apply to these services. In this regard, the emergence of VoIP services dramatically underscores the urgent need for the Commission to complete intercarrier compensation reform as quickly as possible and to move to a rational system in which all traffic is exchanged under the same compensation rules. The Commission has already raised these issues in the pending intercarrier compensation rulemaking, and some in the industry continue to work to achieve an industry consensus on these issues. It is critically important that the Commission take interim steps – including a ruling in this proceeding that all VoIP services, regardless of regulatory classification, are exempt from legacy access charges – that will provide Verizon, BellSouth and other incumbent LECs with appropriate incentives to reach consensus

with other carriers (rather than continuing to drag their feet to preserve their access charge bonanzas).

The access charge system has long outlived its usefulness and now – especially in an era in which the RBOCs have full interLATA authority under § 271 – it serves only as an anticompetitive source of monopoly profits and potential price squeezes. Comprehensive reform will not occur immediately, but under *no* circumstances should the Commission require any VoIP providers to pay traditional access charges, pending completion of intercarrier compensation reform. *See Notice* ¶ 61 (seeking comment on the "extent to which access charges should apply to VoIP"). The imposition of above-cost legacy access charges would radically alter the economics of providing VoIP services and would severely impede the development of those services.

As explained above, most IP-enabled services (including AT&T's VoIP offerings) are information services. Under the Commission's rules, only interexchange carriers providing interstate or foreign "telecommunications services" are obligated to pay interstate "carrier's carrier charges," or access charges.[9] Information service providers (including VoIP providers) are not obligated to pay access charges, and indeed, such services would fall within the Commission's ESP exemption.[10] Because these services fall outside the Commission's access charge rules, VoIP providers typically purchase PRIs or other local business lines to connect to the PSTN and pay the terminating LEC pursuant to § 251(b)(5) negotiated or arbitrated interconnection agreement compensation such as reciprocal compensation. Thus, contrary to the

[9] 47 C.F.R. § 69.5(b) ("Carrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local facilities for the provision of interstate of foreign telecommunications services").

[10] *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 96-98, 99-68, Order

Bells' claims, VoIP services that do not pay access charges do not receive a "free ride." The Commission should make crystal clear in this proceeding that VoIP providers can continue to pay enhanced service rates such as reciprocal compensation pending more comprehensive intercarrier compensation reform.

Moreover, the Commission should, in this proceeding, affirmatively exempt *all* VoIP services from access charges, whether or not they might otherwise be subject to access charges under current rules. There is no conceivable public interest basis for foisting economically irrational access charges, which are a relic of the legacy monopoly circuit-switched networks – and which no longer make any sense even in that environment – on new IP-enabled services. For two decades, the Commission has consistently refused to require information service providers to pay access charges, because it has always recognized that the "access charge system contains non-cost-based rates and inefficient rate structures," and "[m]aintaining the existing pricing structure for these services avoids disrupting the still-evolving information services industry."[11] That is especially true today for IP-enabled services, because any obligation to pay bloated access charges would deal a crippling blow to the development of these services.

Exempting all VoIP services from access charges is also necessary to ensure that different VoIP services are not subjected to differing access charges based solely on the vagaries of classifications like "telecommunications service" and "information service." There is no sound basis for applying differing regulatory treatment to different types of IP-based services,

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on Remand and Report and Order, 16 FCC Rcd. 9151 (2001) ("*ISP-Bound Traffic Order*").

[11] First Report and Order, *Access Charge Reform, et al.*, 12 FCC Rcd. 15982, ¶¶ 344-45 (1997) ("*Access Reform Order*"). *See also id.* ¶ 344 ("[w]e think it possible that had access charges applied to ISPs over the last 14 years, the pace of development of the Internet and other services would not have been so rapid"); *Pulver.com Order* ¶ 19 (permitting Pulver to offer its IP-based service free of any access charges "will facilitate the further development of [that service] and

which would merely subject IP-enabled services to the same regulatory distortions that apply to today's circuit-switched services, in which some carriers pay either cost-based reciprocal compensation or exchange traffic pursuant to a bill and keep mechanism, while others pay bloated access charges, for the same functions. The Commission should not pick winners and losers among different types of VoIP providers by applying access charges to some but not all services. Many providers of IP-enabled voice services are preparing to introduce a wide range of different offerings that may potentially fall into one or another regulatory category. The Commission should allow the market – not disparate regulatory treatment – to determine which of these services provide the most efficient and useful new applications and innovations.

Likewise, the Commission should not pick winners and losers between VoIP providers and traditional LECs. Whatever the historical wisdom of requiring interexchange carriers to subsidize through inflated access charges local exchange carriers that operated in a different market, it makes no sense to require VoIP providers to subsidize the very local exchange carriers against whom they will be directly competing.

The Commission should thus make clear that this access charge exemption extends both to "computer-to-phone" and "phone-to-phone" VoIP services. With respect to "computer-to-phone" VoIP services that originates or terminates on the PSTN, there is no practical way to apply the legacy access charge regime. In particular, there are no practical billing practices or signaling methods in place to identify whether traffic coming from the Internet is local, intrastate toll, or interstate toll. The historical presumption that telephone numbers indicated the fixed geographic point from which calls originated is no longer reliable. Any attempt to force VoIP providers to pay access charges would be discriminatory and would impede the development of

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Internet applications like it and these offerings, in turn, will encourage more consumers to

such services, because VoIP providers would inevitably be forced to pay access charges on traffic that is in fact local. Applying the access charge regime to the PSTN end of VoIP calls would also impede the development of a number of nomadic features of VoIP, such as the "Locate Me" feature of the AT&T CallVantage service. Customers will not want to use the Locate Me feature if VoIP providers are required to pay legacy access charges whenever a customer designates a PSTN number as the number where the customer can be located. And allowing incumbents to collect access charges from VoIP providers would do nothing to protect the incumbents' access revenues or to maintain any sort of regulatory parity; to the contrary, applying the access charge would only hasten the migration of services away from the PSTN and toward IP-enabled networks on both ends of calls. The Commission must fix intercarrier compensation, rather than burdening VoIP providers with access charges.[12]

Although the Commission issued a declaratory order holding that its existing rules require the payment of interstate access charges on certain phone-to-phone VoIP services on a going-forward basis, the Commission made clear that it adopted this holding only "to provide clarity to the industry . . . pending the outcome of the comprehensive *IP-Enabled Services* rulemaking proceeding," and that "[w]e in no way intend to preclude the Commission from adopting a different approach when it resolves the *IP-Enabled Services* rulemaking proceeding or the *Intercarrier Compensation* rulemaking proceeding." *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket

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demand broadband service").

[12] To the extent that the Commission believes that its current rules require some or all VoIP providers to pay access charges, and it is not willing to use its rulemaking authority to exempt all such services, then it should forbear from applying access charges to those services. Level 3 has already sought forbearance from access charge rules for the VoIP services at issue here (which would include AT&T's VoIP offerings), and the Commission is required to act on that petition by December 2004.

No. 02-361, Order, ¶ 2 (released Apr. 21, 2004). Loading legacy access charges onto this subcategory of VoIP services creates substantial disincentives to build out IP backbone networks and to upgrade them with new capabilities that are necessary to the future development of *all* IP-enabled services. And, equally important, assuring ILECs that they are guaranteed a continuation of an artificially inflated access revenue stream so long as they require interconnecting carriers to terminate traffic in TDM format provides a perverse disincentive to the ILECs *not* to upgrade local networks to IP and *not* to participate in intercarrier compensation reform efforts.

The *Notice* (¶ 61) states that "[a]s a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective" of where the traffic originated. That is an appropriate guidepost for the comprehensive intercarrier compensation regime that must supplant the current, broken regime – all traffic should be subject to the same compensation rules. But it is not descriptive of the current patchwork of regulations under which LECs charge different prices for the same uses of the network based on entirely arbitrary categories, and it most certainly is not a basis for imposing access charges on VoIP services because they use the PSTN in the same way as ordinary POTS services. In this regard, VoIP services use the network in the same way as information services as well, and thus the same policy would support exempting all VoIP services from access charges. The problem is the access charge regime, not VoIP, and the Commission should fix only that which is broken. Rather than impeding the development of VoIP by saddling such services with the bloated and outdated access charge regime, the advent of VoIP dramatically underscores the urgent need for the Commission to complete

comprehensive intercarrier compensation reform. In no event, however, should the Commission extend that outdated system to VOIP services, either temporarily or permanently.

Finally, the Bells' frequent contention that the ESP exemption applies only when an enhanced service provider is communicating with its own customers is simply incorrect. Enhanced service providers are defined as "end users" for purposes of the access charge rules. 47 C.F.R. § 69.2(m). "End users" are entitled to purchase local business lines (which includes payment of end-user interstate access charges, such as the Subscriber Line Charge). 47 C.F.R. § 69.5(a).[13] Accordingly, ESPs always have the option of purchasing local retail services just like other end users, whenever such services can be practically used to provide access. The Commission has *never* held that the ESP exemption is subject to any other limitation (except, of course, the general prohibition on treating like services differently).[14] The Bells' claim to the contrary rests almost entirely on a stray comment in the *Access Reform Order*, in which the Commission noted that enhanced service providers use the local network "to receive calls from their customers."[15] In context, that offhand phrasing did not even purport to be a legal statement of when the ESP exemption applies.[16] To the contrary, two paragraphs earlier in the same order the Commission *did* describe the scope of the ESP exemption, and it stated without qualification that "[i]n [1983], the Commission decided that, although information service providers (ISPs)

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[13] In this regard, the short-hand term "ESP exemption" is something of a misnomer, because the rules are not phrased in terms of an exemption; rather, the rules define ESPs as end-users, who are then subject only to the general rules governing end-users.

[14] *Northwestern Bell Petition for Declaratory Ruling*, Memorandum Opinion and Order, 2 FCC Rcd. 5986 (1987) ("*Talking Yellow Pages Order*").

[15] *Access Charge Reform, et al.*, CC Docket Nos. 96-262 *et al.*, First Report and Order ¶ 343 (1997) ("*Access Reform Order*").

[16] The full sentence, contained in a background section, is "[w]e explained [in the *Access Reform NPRM*] that ISPs should not be subjected to an interstate regulatory system designed for circuit-switched interexchange voice telephony solely because ISPs use incumbent LEC networks to

may use incumbent LEC facilities to originate *and terminate* interstate calls, ISPs should not be required to pay interstate access charges." *Access Reform Order* ¶ 341 (emphasis added); *see also Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, Notice of Proposed Rulemaking, 2 FCC Rcd. 4305, ¶ 2 (1987) (Commission had "initially intended to impose interstate access charges on enhanced service providers for the use of local exchange facilities to originate *and terminate* their interstate offerings" (emphasis added)).

B. The Commission Should Establish Regulations to Protect Consumers' Social Interests.

As consumers migrate to IP-enabled services in large numbers, it is reasonable and desirable for the Commission to continue regulatory oversight of beneficial social services such as E911 and access for individuals with disabilities. At the same time, the Commission should be careful not to sacrifice important benefits or limit new features of VoIP services by trying to force the "square" peg of VoIP into "round" legacy holes. Reconciling these two equally important goals will take time and creativity. Accordingly, the Commission must allow a reasonable transition to give manufacturers, service providers, and others sufficient time to design and implement the necessary adjustments. Optimal development of VoIP services requires that regulation for social concerns be tailored to the distinct technological characteristics of VoIP services, allow for design of industry standards and recognize that this requires phasing-in regulation over a reasonable transition period. With respect to upgrading and IP-enabling the nation's 911 answering system, mechanical application of legacy rules will stifle the very innovation that may better serve the policy goals.

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receive calls from their customers." *Access Reform Order* ¶ 343.

1. The Commission Should Ensure VoIP Providers Can Provide 911 and E911 Services After A Transition Period.

The *Notice* reaffirms the Commission's broad authority to impose public safety requirements on interstate wire communications (*Notice* ¶ 53), and asks whether that authority should be used to impose "basic" and "enhanced" 911 requirements on IP-enabled services. *Id.* ¶¶ 53-57. These public safety capabilities are an important and beneficial part of the communications system, and IP-enabled voice services ultimately should include them. The Commission should recognize, however, that a transition period will be necessary before it imposes any such requirements, because IP networks and VoIP technology cannot currently support 911 or E911 in many circumstances.

As the *Notice* recognizes (¶ 51), 911 and E911 capabilities were developed decades ago for traditional wireline communications, with a monopoly provider and an end-user tethered to a specific geographic location. As a result, the nation's 6,500 local Public Safety Answering Points ("PSAPs") reflect a bewildering patchwork of arrangements with incumbent wireline carriers. PSAPs often have extremely limited funding from state governments, and many PSAPs operate today with equipment and other arrangements that are outmoded even by the standards of traditional wireline telephony (much less IP-enabled telephony).

Notwithstanding these limitations, AT&T entered into an agreement with Intrado to enable 911 dialed calls by AT&T CallVantage service customers to be completed to PSAPs. Under AT&T's arrangement with Intrado, Intrado has established a process for geocoding the service address provided by the VoIP end-user so that it corresponds to a public safety answering point for the geographic location specified by the caller. When the caller dials 911, AT&T interfaces with Intrado's geocoding database for the PSAP 10 digit number and then routes the call to the PSAP. This arrangement allows AT&T to complete 911 dialed calls. As long as the

customer is using her telephone adapter at the location she has designated (usually her home), the call will complete to a geographically appropriate PSAP. Since the calls are not completed via 911 trunks, however, the customer location indicator information is not available to the PSAP.[17] AT&T's IP-based services in the enterprise market, such as IP Centrex, will also provide basic 911 functionality, using AT&T's own network capabilities to route 911 calls to the PSAP associated with the IP user's customary location.[18]

This interim approach builds on the broader agreement between a coalition of VoIP providers (the Voice over the Internet, or "VON," Coalition) and the National Emergency Numbering Association ("NENA") on principles governing the provision of 911 service by VoIP providers. Specifically, in December 2003, the parties agreed that VoIP providers would provide 911 emergency services (routing to a PSAP 10-digit number) to VoIP customers (using phones that have functionality and appearance comparable to conventional telephones) within 3 to 6 months of offering VoIP in the jurisdiction. The agreement further specifies that upon entering markets, the VoIP provider is to contact the PSAP to inform it of the approach it will take to providing 911 access. *See Notice* ¶ 56 & n.163.

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[17] Current technology allows Intrado to assign only a single geographic location to the VoIP end user's number. The end-user can notify the VoIP provider that the telephone adapter is being moved to a new location, but it takes several days for Intrado to make such a change in its database. Thus, if an end-user takes the telephone adapter to another location for an extended period, the change can be reflected in Intrado's database. Because of the lead-time necessary to make changes in Intrado's database, changes to the 911 service address for short-term or unplanned nomadic use of the telephone adapter is impractical to accommodate.

[18] The 911 capabilities presently available for AT&T's IP offerings to the enterprise market are similarly tied to the IP address associated with the caller's normal office location, and do not have the ability to immediately recognize a change in location, such as when an end user connects her IP-enabled CPE into a network connection at another office location, making short term or nomadic use of the service impossible to accommodate for 911 purposes with present technology.

More extensive 911 capabilities for VoIP services which would accommodate enhanced 911 capabilities for nomadic use are technically infeasible today, both for AT&T's residential and enterprise IP offerings. AT&T and other industry members, however, are working hard to develop more comprehensive solutions that will allow users to have access to a fuller set of 911 capabilities, comparable (or even superior) to enhanced 911 in the context of traditional telephony. As part of the VON Coalition, AT&T is working with NENA and others to develop standards and procedures for implementing an enhanced 911 capability for VoIP services. As a result, multiple vendors are already competing to propose industry solutions to the VoIP E911 challenge. Indeed, IP technology promises to allow PSAPs and service providers to offer 911 capabilities that go well beyond the capabilities in the traditional wireline network. Importantly, these advances should enable individuals to reach 911 emergency services from whatever peripheral device they are using – including Blackberries and text messaging devices. Not only will this serve mobile end-users, it will increase 911 accessibility to the deaf, hard of hearing, and speech impaired. Furthermore, the integration of voice and data applications through VoIP promises to provide first responders with important real time data regarding the individual who placed a 911 call, or even details regarding the physical location from which such a call originated (*e.g.*, floor plans).

To realize these benefits, however, the entire industry – service providers, manufacturers, and PSAPs – must work together to overcome a number of substantial obstacles. For example, the inherently nomadic nature of IP-enabled services requires the industry to invent an entirely new solution for enhanced (and even some basic) 911 services. One of the principal benefits of IP-enabled services is that one can take one's telephone adapter anywhere, and use one's own VoIP service wherever one can find a broadband connection. Because Internet addresses have

no geographic location, however, the network has no way of knowing where a caller is physically located. No company can solve this problem alone. As originally implemented, 911 was designed for one monopoly provider network pre-divestiture. However, in a competitive environment, the solution must come from the industry as a whole, working with manufacturers, to develop a standardized means of signaling a caller's physical location (a "dynamic ALI"). Moreover, that solution must be designed to work across a wide variety of types of networks (*e.g.*, cable, wireline, wireless, etc.).

Even more importantly, however, PSAPs must update their systems to bring them into the era of IP-enabled services. The industry and manufacturers, working together, will likely develop technologies, devices and standards over the next few years that would enable providers to offer a wide array of enhanced 911 features in conjunction with IP-enabled services. These advances will be meaningless, however, unless PSAPs upgrade their own equipment so that they can interpret enhanced 911 data from IP networks. This is likely to be a gargantuan undertaking for the PSAPs, who chronically face limited funding and, as noted, often operate with outdated equipment even by pre-IP standards. The advent of IP-enabled services promises far more effective enhanced 911 features than exist today, but only if PSAPs can accomplish substantial upgrades in their own equipment.[19]

Overcoming all of these obstacles will take time. Therefore, while the Commission should ensure that 911 and E911 capabilities are available in conjunction with IP-enabled voice services and have the vision to accommodate IP enabled text and other information services, the Commission should recognize that a period of transition will be necessary before these

[19] *See Notice* ¶ 53 ("[w]e recognize, too, that IP-enabled services may enhance the capabilities of PSAPs and first responders – and thus promote public safety – by providing information that cannot be conveyed by non-IP-enabled systems"). Congress is currently considering legislation

capabilities can become a reality. As the Commission correctly recognizes (*Notice* ¶ 53), "we are mindful that development and deployment of these services is in its early stages, that these services are fast-changing and likely to evolve in ways that we cannot anticipate, and that imposition of regulatory mandates, particularly those that impose technical mandates, should be undertaken with caution." Consistent with that recognition, the Commission should acknowledge that industry coalitions are working diligently to find an industrywide solution, and as the industry develops a specific solution, the Commission should oversee that process and work with all parties, including state commissions, to ensure that a cohesive, standardized process can be implemented on a nationwide basis.[20]

2. The Commission Should Require IP-Enabled Voice Products and Services To Implement "Readily Achievable" Disability Measures In Accordance With Section 255.

To ensure that individuals with disabilities have maximum access to IP-enabled voice services, the Commission should extend its § 255 disability rules to IP-enabled voice services,

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that would provide funding for PSAPs to make E911-related upgrades.

[20] In its *E911 Scope Order*, the Commission identified four criteria for determining whether to require E911 regulation: (1) whether the entity offers two-way switched voice service that is interconnected with the PSTN; (2) whether customers have a reasonable expectation of E911; (3) whether the service competes with traditional voice service; and (4) whether it is technically feasible to provide E911. Report and Order and Second Further Notice of Proposed Rulemaking, *Revision of the Commission's Rules to Ensure Compatability With Enhanced 911 Emergency Calling Systems, et. al,* 18 FCC Rcd. 25340, ¶¶ 18-19 (2003) ("*E911 Scope Order*"). While VoIP services satisfy the first and third factors, and may satisfy the second as well, E911 is simply not technically feasible for VoIP services at this time. Accordingly, under Commission precedent, the Commission could not impose an E911 requirement on VoIP services absent a reasonable transition to allow the industry to develop a technically feasible means of providing E911. The situation today with VoIP services is much like the situation with wireless services in the early 1990s, when a technically feasible means of providing E911 was conceivable but not yet a reality; there, the Commission required wireless carriers to provide E911 but only after a substantial, multi-year transition period. *See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 18676 (1996).

but defer any extension of the requirements to IP-enabled advanced features. AT&T has long been at the forefront of ensuring that its telecommunications services are accessible to individuals with disabilities, and it is now at the forefront of making VoIP services accessible as well. To make sure the entire industry – manufacturers and service providers – are sufficiently focused on developing accessibility measures, the Commission should extend to VoIP providers the general § 255 mandate to implement "readily achievable" measures.

Section 255 and the Commission's implementing rules establish a simple set of requirements. Section 255(b) requires a "manufacturer of telecommunications equipment and customer premises equipment" to ensure that its products are accessible to and usable by persons with disabilities, if "readily achievable." Section 255(c) requires a "provider of telecommunications service" to ensure that its services are accessible to and usable by persons with disabilities, if "readily achievable." The term "readily achievable," taken from the Americans with Disabilities Act, means "easily accomplishable and able to be carried out without much difficulty and expense," and requires a case-by-case analysis of several factors, including the cost and nature of the action and the resources available to the entity.[21] If such access is not "readily achievable," the equipment or service must be made "compatible" with peripherals or specialized CPE commonly used to allow access for persons with disabilities. 47 U.S.C. § 255(d). The Commission has held that each manufacturer and service provider must review the accessibility of its products and services at each "natural opportunity" to do so.[22]

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[21] *See generally Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd. 6417, ¶¶ 43-70 (1999) ("*Disability Access Order*").

[22] The Commission has held that such natural opportunities could include "the re-design of a product model, upgrades of services, significant rebundling or unbundling of product and service packages, or any other modifications to a product or service that require the manufacturer or

Under these rules, manufacturers and service providers are under a continuing obligation to evaluate the accessibility of their products and services. In the context of traditional telephony, manufacturers and service providers, including AT&T, have introduced a number of "readily achievable" measures to make the telephone network more accessible, for example AT&T's regular services include such features as Braille billing and TTY access to customer care and billing representatives. In addition, two of AT&T's first IP-enabled services were IP Relay and Video Relay, which allow hearing impaired users to access Telecommunications Relay Services ("TRS") through the Internet rather than through TTY teletypewriters. As the Commission has found, these IP-enabled TRS services provide significant benefits that traditional TTY devices could not offer.[23] Video Relay even allows users to sign their communications, rather than typing them as with traditional TTY devices.

Section 255, by its terms, imposes requirements only on manufacturers and providers of telecommunications services, not on information service providers. The Commission has recognized, however, that it has authority to impose the same accessibility requirements on information services under its ancillary Title I jurisdiction. In 1999, the Commission "assert[ed] ancillary jurisdiction to extend these accessibility requirements to the providers of voice mail and interactive menu services and to the manufacturers of the equipment that perform these functions." *Disability Access Order* ¶ 93. The Commission found that it had subject matter jurisdiction over the communications at issue under Title I (§§ 1-3) and that voice mail and

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service provider to substantially re-design the product or service." *Disability Access Order* ¶ 71.

[23] *See Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Petition for Clarification of WorldCom, Inc.*, CC Docket No. 98-67, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd. 7779, ¶¶ 7-9, 26 (2002).

interactive menu services were "reasonably ancillary" to § 255's statutory obligations. *Id.* ¶¶ 94-106.

The Commission should use its Title I authority to require IP-enabled voice services to comply with the general standards that the Commission has adopted under § 255. The Commission's authority over information services is "well settled," *Computer and Communications Indus. Ass'n* v. *FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982), and the Commission has used that ancillary authority to adopt many rules similar in scope, including structural separation requirements and comparably efficient interconnection regulations. For VoIP services, marketplace pressures alone will not always ensure that all "readily achievable" measures to provide access are made available. A Commission mandate, applicable to both manufacturers and service providers, would be appropriate, to make sure that the entire industry remains focused on continually evaluating whether new accessibility measures are "readily achievable."

More specific mandates, however, are unnecessary now. As the Commission has noted, "[t]he readily achievable obligation imposed by section 255 is both prospective and continuing." *Disability Access Order* ¶ 71. Under that standard, manufacturers and service providers are under a constant duty to assess at any "natural opportunity" whether new measures are readily achievable and can be implemented. The advent of IP-enabled voice services has already made possible a number of new accessibility measures that give persons with disabilities better access to the telephone network in some respects than was ever possible in traditional telephony.[24] Moreover, although TTY devices are currently incompatible with VoIP services, because the current methods for packet loss compensation in VoIP services render the TTY signals

[24] *See, e.g.*, "How VoIP Can Connect the Disabled," Business Week (Apr. 28, 2004).

unrecognizable, the Commission can reasonably expect manufacturers to solve this technical problem in the relatively near future such that readily achievable measures can be implemented. Indeed, as VoIP technology continues to improve, it is reasonable to expect that a wide variety of new accessibility measures will become "readily achievable" for the first time, and that IP-enabled voice services will permit greater accessibility than ever before. *See Notice* ¶ 59 ("current or future IP-enabled services may facilitate communications by individuals with disabilities more effectively than traditional technologies"). The Commission, moreover, can monitor these developments over time and mandate more specific measures if that becomes necessary. To encourage those innovations in this nascent market, however, the Commission should apply the general mandate to implement readily achievable measures, but it should not at this time adopt more specific mandates that may artificially limit the creativity and opportunities for manufacturers and service providers.[25]

3. The Commission Should Reform Its Outdated Universal Service Program.

The *Notice* seeks comment "on how the regulatory classification of IP-enabled services . . . would affect the Commission's ability to fund universal service." *Id.* ¶ 63. This question is inextricably linked to the issues the Commission has already raised in its proceeding on reform of the universal service contribution system. AT&T and others have proposed a contribution system in that proceeding that would replace the current revenues-based system with a numbers/capacity-based system that is fairer and more sustainable. AT&T's proposal would require VoIP providers to contribute to the Commission's universal service support mechanisms

[25] For example, as readily achievable measures are implemented, the Commission should consider the N11 dialing challenges and related relay reimbursement funding issues of forwarding 711 dialed calls to appropriate state relay centers for virtual number and nomadic users of IP services.

(regardless of whether they are considered telecommunications carriers or information service providers). The Commission should adopt that system as soon as possible.

As the Commission and virtually the entire industry recognize, the current USF is in a "death spiral." The fund's obligations continue to grow; the Wireline Competition Bureau has estimated that the size of the fund will grow 16% between 2003 and 2007.[26] At the same time, the contribution base, which is based on interstate telecommunications service revenues, is shrinking rapidly, as consumers increasingly migrate to services that have reduced contribution requirements (such as wireless long distance calling) or no contribution requirements at all. The current system is unsustainable, and complete reform is urgently needed.

In the *Contribution Reform* proceeding, AT&T has offered a comprehensive proposal to replace the current revenues-based system with a new system in which contributions are based on numbers or special access capacity. Under this system, there would be a flat-rated charge, assessed against the provider, for each assigned telephone number that maps to a unique end-user's service. Special access services would also be assessed a flat-rated charge based on the capacity of the service. As AT&T has shown in detail elsewhere, this system is stable and sustainable going forward.[27] A numbers/capacity-based system would provide a solid foundation for the fund because the use of numbers is increasing. Moreover, VoIP providers would be fully included, because experience to date confirms that VoIP services are almost always associated with NANP numbers. This system would be much more equitable than the current system, and it

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[26] *Commission Seeks Comment on Staff Study re Alternative Contribution Methodologies*, Public Notice, FCC 03-31 (Feb. 26, 2003).

[27] *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Comments of AT&T Corp. (filed Feb. 28, 2003) ("AT&T Contribution Reform Comments"), and AT&T's *SFNPRM* Reply Comments and Comments on The Staff Study (filed Apr. 18, 2003).

would halt the erosion of the contribution base that is a result of migration to nontraditional services.

The *Notice* asks whether, to the extent IP-enabled services are "information services," the Commission can require non-facilities-based providers to contribute to universal service. *Id.* ¶ 64. The Commission has ample authority to adopt a numbers-based contribution system that would apply to all providers, including IP-related service providers, regardless of the classification of VoIP providers. The Commission has plenary authority over numbers under § 251(e), 47 U.S.C. § 251(e). That authority extends to all providers that use numbers, including telecommunications carriers, information service providers, and even non-facilities-based IP-related providers. Assessing a fee for the use of numbers is clearly within the Commission's plenary authority to administer the numbering plan, because such fees unquestionably serve a useful conservation purpose, especially with the increasing possibility of number exhaust.

Moreover, § 254 permits the Commission to include non-facilities-based VoIP providers in the contribution base, even if they are information service providers. Section 254(d) permits the Commission to extend the contribution base to "providers of interstate telecommunications." Information services, by definition, are provided "via telecommunications." 47 U.S.C. § 153(20). Accordingly, all information services have a telecommunications component, and thus all information service providers are "providers of interstate telecommunications" subject to the Commission's permissive authority within the meaning of the third sentence of § 254(d).[28]

[28] Even if that were not true, the Commission could fill gaps in its § 254 authority by relying on its pre-1996 Act authority to create universal service systems under Title I. Non-facilities-based providers of VoIP services benefit from the ubiquity of the telecommunications network and therefore can equitably be required to pay into the fund to support the universal availability of that network. The D.C. Circuit upheld the Commission's historical, pre-1996 universal service program under § 1 of the Act, *NARUC* v. *FCC*, 737 F.2d 1095, 1108 n.6 (D.C. Cir. 1984), and the Commission could use that authority here to include additional providers in the contribution

The Commission also asks how providers of IP-enabled service could determine the portion of their revenues that "constitute end-user telecommunications services." *Id.* ¶ 64. Under AT&T's numbers/capacity-based system, this inquiry would be irrelevant. Indeed, that is one of the major benefits of AT&T's approach, because the Commission's current method for determining interstate telecommunications revenues within a bundle is unfair, difficult to administer, and should be replaced.[29] In fact, VoIP services, by their nature, would be especially hard hit if the current contribution scheme applied to such services, because it is inherently impossible to track the jurisdictional nature of IP-based communications. For this reason, even if the Commission does not deem VoIP services to be wholly jurisdictionally interstate, VoIP providers could be forced to count the entire service as interstate for universal service purposes, an outcome that would place VoIP services at a competitive disadvantage relative to traditional circuit-switched services and wireless services.[30]

4. The Commission Should Not Extend Other Rules to VoIP.

The Commission also seeks comment on whether it is necessary to extend certain consumer protection requirements to VoIP services, including customer proprietary network information ("CPNI"), "slamming," and "truth-in-billing" requirements. *Notice* ¶¶ 71-72. As the *Notice* seems to recognize, none of these provisions of the Act apply to VoIP now. Nor should they be extended to VoIP. VoIP services are already subject to an extremely broad array

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base of its existing universal service program created under § 254.

[29] *See, e.g.*, AT&T Contribution Reform Comments, at 15-18.

[30] Another way to make the universal service system competitively neutral would be to adopt an assessment base based on all revenues, interstate and intrastate. The Fifth Circuit, however, has rejected a previous Commission attempt to address intrastate matters. *TOPUC* v. *FCC*, 183 F.3d 393, 421-24, 446-48 (5th Cir. 1999).

of federal and state consumer protection statutes, and there is no compelling need to extend any of these additional Communications Act measures to VoIP.

For example, § 258's prohibition on "slamming" does not apply to VoIP, and there is no reason to extend those rules to VoIP. It is extraordinarily difficult to "slam" a VoIP customer, because a VoIP end-user's service is tied to her telephone adapter. A would-be slammer would literally have to install a telephone adapter in an end-user's residence. Slamming is no more a practical threat in the VoIP environment than it is in the ISP industry. VoIP gives the end user absolute control over her service, and this control effectively ends the practice of slamming.

Similarly, the Commission's "truth-in-billing" rules also would not and should not apply. VoIP providers are already subject to a host of federal and state requirements that mandate truthful billing and ban deceptive practices. There is no need to add this extra layer of regulation. Nor should § 214 entry and exit regulation be extended to VoIP. Such regulation is unnecessary, and the threat of burdensome and lengthy proceedings if a VoIP provider chooses to exit the market will deter entry.

Nor do the CPNI requirements of § 222 apply to IP-enabled voice services, because § 222 does not apply to information services. 47 U.S.C. § 222. The Commission's principal concern under § 222, however, has always been the ability of carriers to use calling data to profile their customers and market other services to them. That concern is substantially attenuated in the context of VoIP, because VoIP offerings tend to be complete bundles of all services. Moreover, the Commission can rely on market incentives to ensure that IP service providers use information properly. For its part, AT&T had subjected its AT&T CallVantage service to AT&T's Online Privacy Policy, which provides that AT&T "will not disclose your customer identifiable information to third parties who want to market products to you." Other provisions further

restrict disclosures of individually identifiable customer information.[31] Thus, CPNI protections are not needed to protect consumer privacy for AT&T's VoIP information service.

C. The Commission Should Preempt State Regulation of IP-Enabled Applications That Would Negate Federal Policies.

The *Notice* seeks comment on both the existence and exclusivity of the Commission's jurisdiction over IP-enabled services. *Notice* ¶¶ 38-41. The Commission clearly has jurisdiction over VoIP services (both residential and business services) based on the inherent interstate component of the communications enabled by these services. Moreover, the Commission can and, where appropriate, should assert a strong federal interest in the development of VoIP services that would justify pre-emption of any state regulation of the application layer of IP-enabled services that would have the effect of negating federal rules and policies.

The Commission can unquestionably assert jurisdiction over almost all VoIP services, because those services enable communications that are in substantial part interstate communications. AT&T's business services that incorporate VoIP capabilities are very often designed to facilitate communications between sites in different states, as well as those by users that use the IP-enabled service to initiate a communication from a remote location in one state to business facilities located in another state. AT&T CallVantage service is offered with nationwide calling and advanced call management/forwarding/placing features. Attempting to discern the true geographical endpoints of any permutation of call and/or feature application that

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[31] *See* http://www.att.com/privacy. For example, the Online Privacy Policy further provides that "AT&T will not sell, trade, or disclose to third parties any customer identifiable information derived from the registration for or use of an AT&T online service -- including customer names and addresses -- without the consent of the customer (except as required by subpoena, search warrant, or other legal process or in the case of imminent physical harm to the customer or others). When AT&T uses other agents, contractors or companies to perform services on its behalf, AT&T will ensure that the company protects your customer identifiable information consistent with this Policy."

may occur is more complex than any signaling system currently available, let alone in standard industrywide use, might manage. For regulatory purposes, it is impossible to separately address only the interstate communications enabled by the applications, especially in light of the inherently nomadic nature of services. Under the "mixed use" doctrines developed by the Commission and in accord with federal court decisions, federal jurisdiction clearly exists over these services based on the interstate component of the communications generated by these applications.[32]

The affirmative preclusion of state regulation is a separate issue. Although the Commission has recently suggested that in certain circumstances the Commission has exclusive jurisdiction over services it deems interstate,[33] a better approach in this context would be to identify conflicts between federal and state regulation with some particularity and make express preemption findings based upon the harm that state regulation would pose to federal policies. This is particularly warranted because "mixed use" (and untariffed) services and facilities are at issue: although Section 1 of the Communications Act empowers the Commission to regulate services that include interstate communications, without providing that such regulation is exclusive, Section 2(b) still preserves states' authority to regulate intrastate communications. 47 U.S.C. §§ 151 & 152(b).

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[32] *See GTE Telephone Operating Cos*, GTE Tariff No. 1, 13 FCC Rcd. 22466 (1998); *MTS and WATS Market Structure*, 4 FCC Rcd. 5660, n.7 (1989); *see also Louisiana PSC* v. *FCC*, 476 U.S. 355, 360 (1986) ("virtually all telephone plant that is used to provide intrastate service is also used to provide interstate service, and is thus conceivably within the jurisdiction of both state and federal authorities"); *California* v. *FCC*, 39 F.3d 919, 931-32 (9th Cir. 1994); *California* v. *FCC*, 905 F.2d 1217, 1241-43 (9th Cir. 1990); *NARUC* v. *FCC*, 880 F.2d 422, 428-29 (D.C. Cir. 1989); *North Carolina Utils. Comm'n* v. *FCC*, 552 F.2d 1036, 1043 (4th Cir. 1977).

[33] *See* Order, *Petition for a Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, WC Docket No. 03-45, FCC 04-27, ¶¶16 n.57, 20 (Feb. 14, 2004).

Even within the bounds established by Section 2(b), there is broad scope for pre-emption of state regulation where that regulation "negates the exercise by the FCC" of its lawful powers. *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 428-29 (D.C. Cir. 1989); *see also, e.g., Louisiana PSC v. FCC*, 476 U.S. 355, 360 (1986); *California v. FCC*, 39 F.3d 919, 931-32 (9th Cir. 1994) ("*California II*"); *California v. FCC*, 905 F.2d 1217, 1241-43 (9th Cir. 1990) ("*California I*"); *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036, 1043 (4th Cir. 1977).[34] The Commission is empowered to preempt state regulation to the extent that "it can show that the state regulation negates a valid federal policy" and can do so "to the degree necessary to achieve it." *NARUC*, 880 F.2d at 430-31 (emphasis omitted); *see also California II*, 39 F.3d at 931-32.[35] The Commission's exercise of its express preemption power in such circumstances precludes state regulation that is "inconsistent" or "conflict[ing]" with the "valid federal regulatory objective." *Illinois Bell Tel. Co.* v. *FCC*, 883 F.2d 104, 114-15 (D.C. Cir. 1989); *Michigan Bell Tel. Co. v. MFS Intelenet of Mich., Inc.*, 339 F.3d 428, 434-36 (6th Cir. 2003).[36]

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[34] For these reasons, SBC's argument based on "the inherently interstate nature of IP platform services – and thus of the Commission's exclusive jurisdiction over them," (SBC Pet. at 39; *see id.* at 34-41), is doubly wrong. Even if SBC were correct that most communications over the Internet are interstate, there are still also intrastate communications that give rise to the states' power in the absence of a valid preemption order or conflict between state and federal regulations that negate federal policies. And the Commission's "exclusive" jurisdiction does not exist merely because an interstate communication is at issue, but rather exclusivity exists only when the preconditions for preemption, set out above, are satisfied.

[35] The Commission would bear the burden of meeting this showing. *NARUC*, 880 F.2d at 431; *GTE Tel. Operating Cos.*, 13 FCC Rcd. 22466, ¶ 28 (1998).

[36] These cases also control the scope of preemption of state regulation of the RBOCs' restrictive DSL practices designed to limit local telephone service competition. *See BellSouth Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Service by Requiring BellSouth to Provide Wholesale or Retail Broadband Service*, CC Docket No. 03-251 (filed Dec. 9, 2003). Because state regulations designed to bar RBOCs from discontinuing DSL service to customers that choose a competing voice telephone service are

For regulation of IP-based applications, including residential VoIP services, there are very strong interests that would support pre-emption of state regulation that, in fact, has the effect of negating federal policies.[37] As shown above, there is generally no sound basis for economic regulation to apply to these services, and there is a strong federal interest in allowing the services to develop free from harmful regulation. *See* 47 U.S.C. § 230(b)(2) (federal interest in seeking "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services"); *id.*, § 706. Efforts by states to regulate these services through state control over entry pose a particularly strong and unjustified impediment to the development of VoIP and other IP-enabled applications. *Compare* 47 U.S.C. § 253. Requiring applications providers to qualify as telecommunications carriers and subjecting IP-enabled applications to potentially open-ended state regulation designed for traditional telecommunications services would impose unjustified regulatory burdens on these services and create regulatory uncertainties that would inevitably impede investment and product development. The need for a uniformly deregulatory environment is paramount.

In addition, it is not practically or economically possible to separate the intrastate and interstate components of an IP-PSTN "call" without negating the federal objectives to preserve and promote the viability of the Internet and other interactive computer services. *Pulver.com Order* ¶ 20. It is impossible to determine the geographic endpoints of the IP end of an IP-PSTN

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complementary to federal policies designed to foster local competition and limit market power abuses, such state regulations are valid, are not pre-empted, and could not be pre-empted by the Commission.

[37] In contrast, the network supporting IP-enabled applications continues to present severe risks of market power abuse. *See infra* Section III. State and federal regulation have traditionally complemented one another to address these risks that, here, threaten to impede the development of IP-enabled services and related benefits for consumers. For these reasons, the considerations favoring exclusive federal jurisdiction over IP-enabled applications do not apply at the network level and indeed favor a robust ongoing state role in addressing market power abuses.

call. The IP end of a call has a "portable nature without fixed geographic origination or termination points," which "means that no one but the [end users themselves] know where the endpoints are." *Pulver.com Order* ¶ 21. And just as the Commission noted in the *Pulver.com* decision, even if it were "possible to track the geographic location of packets and isolate traffic for the purpose of ascertaining state jurisdiction over a theoretical intrastate component of an otherwise integrated bit stream, such efforts would be impractical." *Id.* ¶ 24. Tracking packets "to determine their geographic location would involve the installation of systems that are unrelated to providing its service to end users," which "would improve neither service nor efficiency." *Id.* In the *Pulver Declaratory Ruling,* the Commission found that such requirements would be directly contrary to the public interest: "In a dynamic market such as the market for Internet applications . . . , we find that imposing this substantial burden would make little sense and would almost certainly be significant and negative for the development of new and innovative IP services and applications." *Id.* That is equally true here, and the Commission should preempt state entry and rate regulation that would negate the federal interest in promoting the development of VoIP services. *See also* Memorandum Opinion and Order, *GCI* v. *ACS,* 16 FCC Rcd. 2834, ¶ 24 (2001) ("[i]t is well-settled that when communications, such as ISP traffic, are jurisdictionally mixed, containing both interstate and intrastate components, the Commission has authority to regulate such communications").

The inherently nomadic nature of VoIP services and CPE makes patchwork regulation by the states particularly unjustified. The Commission should sustain the conditions for vigorous development of these applications by making specific findings for these services that reaffirm and extend the application of the *Computer Inquiries*' conclusions, which preempted states from applying "common carrier tariff regulation" and "public-utility type regulation" to information

services, to IP-enabled applications. *See* Further Reconsideration Order, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 88 F.C.C.2d 512, ¶ 83 n.34 (1980).

Slightly different federal interests support a broad and predominantly federal role for oversight of disability access and 911/emergency services. As with economic regulation, there is a strong interest in uniform, national regulation. In this context, the interest in uniformity favors development and adoption of a uniform approach to disability access and 911/emergency services; a patchwork of differing and conflict state regulations would impede the creation of that uniform regulatory regime. Products are developed on a national basis and, as noted above, a single offering may be used in multiple states at once. Conflicting state regulations would impede development and usage of those offerings. For this reason, the Commission should strive to develop a federal standard and approach to these issues (on the bases described above), and should specifically pre-empt state regulations and requirements that undermine uniformity of the resulting federal regulations and regulatory approach in these areas. However, given the controlling preemption standards outlined above, any Commission preemption of state authority is more likely to prevail if the Commission makes specific findings concerning particular state requirements and their effect on the uniform and effective application of specific federal standards or approaches.

Finally, regulatory certainty would foster development and usage of IP-enabled applications, and definitive determinations by the Commission regarding preclusion of state regulation, where appropriate, would assist in establishing that certainty. In certain other contexts, the Commission has noted generally the federal interests that would justify some considerable scope for exclusive federal jurisdiction and preemption of contrary state

regulations, but has left particular preemption determinations to another day. *See* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978, ¶ 195 (2003) ("*Triennial Review Order*"); *Pulver.com Order* ¶¶ 18, 19 n.70. To the extent that record evidence in this proceeding supports particular findings that preemption of specific types or examples of state regulation, the Commission would increase regulatory certainty and support development of IP-enabled applications by making formal preemption determinations now, rather than deferring the issue to future proceedings.

III. TARGETED REGULATION AT THE FACILITIES LEVEL IS NECESSARY TO ENSURE EFFECTIVE COMPETITION AT THE APPLICATIONS LEVEL.

As the Commission has repeatedly recognized, absent regulation, vibrant retail competition cannot emerge where dominant firms control bottleneck transport "facilities that . . . rivals need to offer their services." *See, e.g., MCI-WorldCom Merger Order*, 13 FCC Rcd. 18025, ¶ 81 (1998); *BT-MCI Merger Order*, 12 FCC Rcd. 15351, ¶¶ 39-40 (1997); *Ameritech Michigan 271 Order*, 12 FCC Rcd. 20543, ¶ 40 (1997). Even where there are multiple providers in a retail market, an entity controlling essential access facilities can exercise power in retail markets by using those facilities to "increas[e] its rivals' costs or by restricting its rivals' output." *LEC Classification Order* ¶ 83; *see also ITTA Forbearance Petition*, 14 FCC Rcd. 10816, ¶ 7 (1999) (incumbent LECs "have the ability and incentive to use their bottleneck facilities to engage in cost misallocation, unlawful discrimination, or a price squeeze against rival interexchange carriers."). As the Commission has recognized, these fundamental economic principles apply not merely to traditional telecommunications services, but information and advanced services as well. *See Computer II*, 77 F.C.C. 2d 384, ¶ 219 (1980) ("The importance of the control of local facilities . . . cannot be overstated. As we evolve into more of an

information society, the access/bottleneck nature of the telephone local loop will take on greater significance").

Although the broadband transport market may ultimately become vigorously competitive, it is not close to that level today. Wireless, satellite, and broadband powerline services have yet to establish themselves as serious alternatives to DSL and cable modem services.[38] Further, head-to-head competition between cable and DSL is generally limited to residential markets. Yankee Group, *Cable and DSL Battle for Broadband Dominance* (Feb. 2004), at 4 (emphasis added) ("*DSL operators dominate* the U.S. [small business] broadband and enterprise remote-office broadband market"). Thus, most relevant geographic markets are characterized (at best) by duopoly competition that the courts, antitrust authorities and the Commission have recognized is generally insufficient to assure competitive market outcomes.[39] In its *Mass Media Ownership Order*, the Commission held that "both economic theory and empirical studies" indicate that "five or more relatively equally sized firms" are necessary to achieve a "level of market performance comparable to a fragmented, structurally competitive market." 18 FCC Rcd. 13620, ¶ 289 (2003).

The paucity of broadband alternatives is exacerbated by the relatively high costs incurred by subscribers in switching providers. These costs prevent effective competition, because "consumers cannot compare and choose between various service plans and options as efficiently." *Cellular Telecomm. & Internet Assoc.* v. *FCC*, 330 F.3d 502, 512 (D.C. Cir. 2003). As AT&T and others explained in considerable detail in response to BellSouth's Request for

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[38] *See, e.g., Ex Parte* Letter from David Lawson, AT&T, to Marlene Dortch, FCC, at 8-9 (filed CC Docket No. 01-338 *et seq.*, Apr. 15, 2004).

[39] *FTC* v. *H.J. Heinz Co.*, 246 F.3d 708, 717 (D.C. Cir. 2001); United States Department of Justice/Federal Trade Commission, *Horizontal Merger Guidelines*, Section 2 (rev. Apr. 8, 1997); *EchoStar-DirecTV Merger Order*, 17 FCC Rcd. 20559, ¶ 103 (2002).

Declaratory Ruling in WC Docket No. 03-251, most broadband subscribers are unwilling to switch broadband transport providers just to obtain telephone services from another provider. As anyone who has purchased DSL or cable modem service is well aware, there are significant set-up costs for broadband service: most broadband subscribers will want to avoid the time and effort needed to install a new service and iron out its bugs. In addition, when a subscriber loses her DSL or cable modem account, she also typically loses her e-mail address. This is an obvious source of customer inconvenience and confusion, further discouraging changes in broadband suppliers. For example, a small business subscriber would have to send a change of e-mail address to all of its e-mail contacts to inform them that its address had changed. Similarly, a person that sells merchandise on eBay would need to update her profile and inform all prior purchasers of her new e-mail address. Switching broadband providers (where possible) can also still leave a temporary gap in coverage, and require a subscriber to re-establish formats, support, and passwords for web pages and Internet-provider services. The market power implications of this lock-in effect are comparable to those that the Commission has found to justify its local number portability and wireless number portability requirements. *See First Number Portability Order*, 11 FCC Rcd. 8352, 8368, ¶¶ 30-31 (1996); *Third Number Portability Order*, 13 FCC Rcd. 11701 (1998).

There are numerous ways in which network access providers could leverage their control of last mile transport facilities to engage in predatory behavior against their VoIP rivals. The Bell practice of requiring customers who purchase DSL to also purchase a POTS line will hamper customers who wish to use DSL and competitive VoIP services without maintaining a POTS line.[40] Alternatively, network access providers could simply block their DSL or cable

[40] *See supra* n.36.

modem customers from reaching VoIP rivals' servers and websites, or provide that access under patently inferior terms relative to their own Internet content. Alternatively, they could use anticompetitive tying policies, such as requiring customers to purchase broadband access/VoIP bundles. Broadband subscribers would be far less willing to purchase VoIP services from their transport provider's rivals if they are already effectively locked into purchasing VoIP service from the transport provider.

The Commission has recognized these concerns. In the AT&T-MediaOne merger, the Commission concluded that "the imposition of proprietary architecture and protocols for broadband Internet applications would pose a serious threat to openness, diversity and innovation of the Internet and the development of competition in the provision of broadband services" and "that, to the extent possible, these broadband applications and content have the ability to interface with the full range of competing broadband [transport] technologies." Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediOne Groups Inc., Transferor to AT&T Corp., Transferee,* 15 FCC Rcd. 9816, ¶ 124 (2000) ("*AT&T-MediaOne Merger Order*"). Thus, the Commission approved the AT&T-MediaOne merger after concluding that no such threat was imminent and committing to "monitor[] . . . broadband developments." *Id.* ¶ 125; *see also id.* ¶ 128 (stating that the Commission would abandon its "hands-off" policy if it were to find that AT&T-Comcast "successfully enter[ed] into exclusive agreements with broadband Internet content or applications providers so as to disadvantage competing broadband providers"). And in the AT&T-TCI merger, the Commission approved that combination only after the parties had expressly agreed that subscribers would have an unimpeded right to reach any Internet website. Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of*

Licenses and Section 214 Authorizations from Telecommunications Inc., Transferor, to AT&T Corp, Transferee, 14 FCC Rcd. 3160, ¶¶ 93-96 ("*AT&T-TCI Merger Order*").

This does not mean that the Commission should, at this time, create new "forced access" regulations of the type it rejected in the *Cable Modem Declaratory Order*. Rather, as detailed below, the Commission should impose targeted regulation that prohibits the most patently anticompetitive conduct. Properly tailored regulation of this kind should impose little burden on broadband transport providers.

As SBC's Declaratory Order Petition confirms, the Bells instead seek to use this proceeding as a vehicle for complete deregulation at the network level without regard to market power concerns. SBC seeks complete deregulation of "IP platform services," which it defines as "(a) IP networks and their associated capabilities and functionalities (*i.e.*, an IP platform), and (b) IP services and applications provided over an IP platform that enable an end user to send or receive a communications in IP format." SBC Pet. at 28. In other words, SBC would have the Commission not only deregulate IP-enabled *applications*, but also any facility or service to which the "IP-enabled" label could be affixed. SBC Pet. at 29. There is no more serious error that the Commission could make. And no such approach could be reconciled with the Commission's repeated recognition of the ability of firms that control last-mile transmission facilities to leverage that power into downstream markets.

The *Notice*, unfortunately, falls into this trap, suggesting that no market power concerns are present because of the likelihood that IP-enabled services will be provided by "multiple" services providers. *Notice* ¶ 74. AT&T fully agrees that, if networks are open, sufficiently vibrant *retail* competition for IP-applications can be expected to develop and to prevent providers from imposing unjust, unreasonable and discriminatory terms and conditions for their

services. Thus, as detailed above, economic regulation of IP-enabled applications will generally prove unnecessary. *Accord, LEC Classification Order* ¶ 88; Order, *Motion of AT&T Corp. to be Classifies as a Non-Dominant Carrier*, 11 FCC Rcd. 3271, ¶¶ 16, 27 ("*AT&T Non-Dominance Order*"). But, for the reasons stated, there is not today sufficient diversity of broadband transport options to be confident that consumers and IP-application providers will be able to obtain nondiscriminatory access to broadband transport.

AT&T requests that the Commission make two basic findings at this time. *First*, the Commission should adopt regulations that ensure that retail customers of the broadband transmission and ISP services of any provider should be free to access any web site for any purpose of the customer's choosing – including to access other providers of VoIP and other IP-enabled application platforms – without interference or other influence of the broadband services provider. *Second*, the Commission should confirm that established economic and policy principles determine whether it grants relief from core Title II obligations that apply to network facilities, rather than the label affixed to those facilities.

A. An Open Internet Is Essential To The Competitive Development Of IP-Enabled Services.

The Internet has flourished to date because of openness. Network owners do not tell narrowband subscribers which websites they can visit or which applications they can run over their Internet connections (subject only to legitimate law enforcement or network integrity concerns). Knowing that customers have unimpeded access to Internet content in turn has given content providers the incentive to invest heavily in developing unique applications and services.

Now, as broadband subscribership has reached a critical mass, a new generation of IP applications is poised to emerge. But these demand-intensive information services will be useable only if broadband Internet subscribers can access the information service provider's

websites without interference. If there is even a serious risk that such access can be blocked by the entities that control the last mile network facilities necessary for Internet access, the capital markets will not fully fund IP-enabled services. Thus, the open model that has been the hallmark of the narrowband Internet should be extended to the broadband Internet. AT&T commends the cable industry for voicing support for this approach.[41]

To accomplish this goal, the Commission should forbid any entity providing broadband access from impeding access to the Internet content of another applications provider, except where such access would threaten the integrity of the network or where required by law. Moreover, the Commission should forbid broadband transport providers not only from blocking outright access to particular IP applications, but also from giving any kind of preferential access to their own IP applications or degrading access to rival IP applications. To the extent that "quality of service" routing is deployed that would give priority to voice packets in case of congestion, the Commission should make clear that network owners must make those capabilities available to unaffiliated VoIP providers on a nondiscriminatory basis, and may not favor their own VoIP packets over unaffiliated VoIP packets. This targeted regulation is necessary to ensure that subscribers choose the IP application that they want to access, not the IP application preferred by the broadband transport providers with essential last-mile facilities.

AT&T emphasizes that it is *not* seeking the "open access" leasing of last-mile broadband transmission facilities that the Commission is considering in its cable modem dockets. Rather, as described above, the Commission can directly prevent anticompetitive use of broadband transport facilities and foster unimpeded access to IP applications with modest technology-neutral *conduct* regulation that merely prohibits broadband carriers from discriminating against

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[41] *See supra* p. 9, n.2.

unaffiliated IP applications and content, while otherwise giving these carriers substantial flexibility over the scope and terms of their service offerings.

B. The Commission Should Prohibit Network Owners From Denying Broadband Service To Consumers That Do Not Purchase Another Service From The Network Owner.

As the Commission is well aware, the Bells are refusing to sell broadband Internet access to any customer that does not purchase the incumbents' voice service. This practice is clearly designed to entrench the incumbent LECs' local voice monopolies. The incumbents know that their DSL subscribers are often unwilling – or simply unable – to switch broadband service providers to obtain voice services from another carrier. Thus, by punishing DSL subscribers that would deal with local voice rivals, the incumbents have taken anticompetitive advantage of the high costs of switching to alternative broadband providers as a mechanism to prevent competition for those customers' voice service.

Allowing the incumbent LECs to continue this practice threatens to devastate nascent VoIP services that, as the Chairman recently recognized, might otherwise pose a direct threat to the incumbents' local monopolies. *Powell Says FCC Is Devising Ways To Deal With 15% Problem*, Communications Daily (May 5, 2004) ("If you're a big incumbent and you sort of enjoy the competitive advantages of being the owner of that kind of service system, you, in my opinion, ought to be terrified [of VoIP]"). Many VoIP subscribers may ultimately decide to drop their existing POTS service and instead use their DSL connection for both Internet access and voice. But given that existing DSL subscribers generally will not drop DSL service in order to choose a rival traditional voice carrier – it is quite likely that the incumbent LECs can profitably impose this requirement in the VoIP context as well, and thereby immunize themselves from VoIP competition. Voice telephone subscribers are simply not going to pay additional money

for VoIP service that provides them with functionality comparable to the telephone services that they must purchase from the incumbent in any event.

The incumbent LECs' current practice, of course, is only a single example of the many ways in which they could take advantage of their enormous DSL customer base to prevent VoIP competition. Instead of requiring subscribers to purchase POTS service as a condition of obtaining DSL service, an incumbent could just as easily require all DSL subscribers to also purchase the incumbent's VoIP service. This would make it effectively impossible for rival VoIP providers to sell service to the incumbent's DSL customer base, for those customers would clearly be unwilling to pay twice for the same service. To prevent market power abuses of this kind, the Commission should broadly prohibit any broadband transport provider from requiring subscribers to purchase any IP-enabled service (or, in the case of incumbent LECs, local telephone service) as a condition of obtaining broadband Internet access service.

These targeted requirements would not prohibit legitimate bundling arrangements that offer broadband Internet access service and VoIP service (or any other IP-enabled service) together at a single price. Such bundling would still be allowed so long as the broadband transport provider also offered Internet access services as a stand-alone service. Instead, what would be prohibited is the refusal by a transport provider of basic broadband Internet access as a condition that a subscriber also purchase VoIP or other voice telephony offering.[42]

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[42] The Commission should establish safeguards, however, against price structures that would allow incumbents to effectively tie Internet access and IP-enabled services while nominally offering these two services separately. As the courts have recognized, a company is economically tying two products when it offers those products at a bundled price that is well below the *a la carte* prices, thereby making the bundled package the only realistic option for purchasers. *See Virtual Maintenance, Inc.* v. *Prime Computer, Inc.*, 957 F.2d 1318, 1323 (6th Cir.) ("A tying arrangement clearly exists here because the large price differential between software support alone and the software support/hardware maintenance package induces all rational buyers of Prime's software support to accept its hardware maintenance"), *vacated on*

This proposed rule is fully consistent with the Commission's *CPE Unbundling Order.* Report and Order, *Policy Rules Concerning the Interstate, Interexchange Marketplace, et al,* 16 FCC Rcd. 7418 (2001). In that proceeding, the Commission held that carriers could bundle customer premises equipment ("CPE"), telecommunications and information services (*i.e.*, offer such two or more of these products or services at a single price that is typically less than the individual prices for the products or services). However, at the same time, the Commission made clear that requiring that customers buy CPE or information service as a condition of obtaining local telephone voice service posed substantial concerns. The Commission recognized that if the incumbents were allowed to implement such a practice it would "discriminat[e] against customers who [would] purchase enhanced service [or CPE] from competitive suppliers" and thereby foreclose competition for the incumbent's CPE and information services. *Id.* ¶ 44. Thus, the Commission permitted the incumbents to offer bundled service only after assuring itself that the incumbents could not undertake such anticompetitive conduct because they were obligated under state law "to offer basic local exchange service on an unbundled, tariffed, nondiscriminatory basis," *id.* ¶ 44, and under federal law to comply with *Computer Inquiries* obligations to "acquire transmission capacity under the same tariffed terms and conditions as competitive enhanced services providers." *Id.* ¶ 43.

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other grounds, 506 U.S. 910 (1992); *Marts* v. *Xerox, Inc.* 77 F.3d 1109, 1113 (8th Cir. 1996) ("Even if the products are available separately, an illegal tying arrangement can exist if purchasing the items together is the 'only viable economic option'"). An incumbent could effectively tie its broadband DSL service and VoIP by, for example, offering these services separately for $50 a month each or combined for $55 a month. Alternatively, some network providers already could price basic broadband service at lower prices than the premium broadband service at sufficient speeds to support VoIP applications. The higher priced broadband service could be made available at a lower price when purchasing bundled premium broadband and VoIP service from the network provider. With such a pricing scheme, no incumbent DSL subscriber could realistically be expected to purchase VoIP services from any other provider.

The Commission's logic in the *CPE Unbundling Order* underscores the need for the Commission to hold that customers can continue to purchase broadband Internet access on a standalone, nondiscriminatory basis. In the context of IP-enabled services, broadband Internet access plays the same role that basic local exchange service plays in the context of narrowband information services – it is the fundamental means by which subscribers will gain access to IP applications. Thus, just at the Commission was vigilant in ensuring that carriers that controlled the narrowband telephone facilities could not tie basic local telephone services with CPE and narrowband information services, so too should the Commission hold that those carriers that control broadband transmission facilities may not tie broadband Internet access services with IP-enabled services.

C. Contrary To SBC's Claims, The "IP-Enabled" Tag Provides No Basis For Exempting ILECs From Core Title II Unbundling Requirements.

The incumbent LECs, presumably because they cannot make the showing necessary for forbearance from dominant carrier regulation, propose wholesale elimination of *all* applicable regulation for their "advanced" services. In its declaratory order petition, SBC requests that the Commission "definitively rule that IP platform services do not fit any of the service-specific legacy regulatory regimes in Titles II, III, or VI of the Communications Act, notwithstanding that particular applications riding on top of the IP Platform may have attributes of traditional services regulated under those Titles." SBC Pet. at 2. Thus, SBC asks for elimination from all existing requirements that Titles II, III and VI would impose on its "IP-platform services."

SBC, however, is characteristically vague about what an "IP-platform service" actually includes. SBC purports to define "IP platform services" as "(a) IP networks and their associated capabilities and functionalities (*i.e.*, an IP platform), and (b) IP services and applications provided over an IP platform that enable an end user to send or receive a communications in

IP format." SBC Pet. at 28. Because there is little debate that IP services that perform net protocol conversion or allow customers to manipulate data are "information services," it is clear that SBC's petition is principally about basic transmission services and the underlying facilities used to provide these services. SBC Pet. at 29.

In SBC's view, it can escape all regulation under the Communications Act simply by continuing the conversion to IP that all network owners are doing. To label this proposal as preposterous is charitable. It plainly cannot be reconciled with the Act, which explains SBC's parallel forbearance petition – a petition that AT&T demonstrates in a separate opposition must be denied in its own right.

It is impossible to overstate the sweeping nature of the relief requested by SBC. SWBT/Ameritech/PacBell/SNET/Cingular would be relieved of all Communications Act regulation of "IP networks" and "IP services" merely by virtue of their use of IP, without regard to whether these facilities and services would otherwise be subject to the Act. For example, *no IP service*, regardless of how basic a service, would need to be provided at just and reasonable rates, would be subject to tariffing requirements, and would have to comply with universal service and disability access obligations. Likewise, all unbundling obligations that currently apply to incumbent LECs or BOCs would be swept away to the extent they would touch an "IP facility."

SBC does not even attempt to reconcile this approach with the Act's language. Instead, it resorts to flag-waving: "A ruling that encompasses not only IP-based services but also the IP-enabled networks over which they are provided is necessary in order to create a rational, deregulatory framework for the Internet." SBC Pet. at 29. This is manifest nonsense.

That a network uses IP does not make the underlying network or the services provided over the network "information services." Under the Act, a facility cannot even be an "information service." *See* 47 U.S.C. § 153(20) ("information service means the *offering* of a capability . . . .") (emphasis added). The different concerns raised by application and network layers have always dictated different regulatory standards.

In fact, section 251(c)(3) and section 271 unbundling obligations are undisturbed in any way by the regulatory classification of IP-enabled services. Even if an ILEC currently used parts (or all) of its network solely to provide "information services" such as VoIP, that would have no impact on section 251(c)(3). The unbundling obligations of section 251(c)(3) apply to "incumbent local exchange carriers." Section 251(h) in turn defines an "incumbent local exchange carrier" as any local exchange carrier that provided "telephone exchange service in such area" as of February 8, 1996 and "that was deemed to be a member of the exchange carrier association pursuant to section 69.901(b) of the Commission's rules." Incumbent local exchange carrier status for purposes of section 251(c) thus does not turn on the extent to which an ILEC provides information services.

The Commission has also made clear that the Act's definition of "network element" includes not only facilities "used" by the incumbent to provide "telecommunications services," but that are "*capable*" of being so used. *Triennial Review Order* ¶ 59 (emphasis added). "To interpret the definition of 'network element' so narrowly as to mean only facilities and equipment actually used by the incumbent LEC in the provision of a telecommunications service . . . would be at odds with the statutory language in section 251(d)(2) and the pro-competitive goals of the 1996 Act." *Id.* ¶ 60; *see also id.* ¶ 59 ("[T]aken together, the relevant statutory provisions and the purposes of the 1996 Act support requiring ILECs to provide access to

network elements to the extent that those elements are capable of being used by the requesting carrier in the provision of a telecommunications service"). The Commission has likewise made clear that so long as a competitive carrier uses a UNE to provide a qualifying "telecommunications service," it may provide any other service as well, including information services. *Id.* ¶ 146.

Similarly, the statutory classification would do nothing to eliminate the BOCs' unbundling obligations under section 271. Those obligations apply directly to BOCs that have obtained long distance authority and are not limited to merely providing "telecommunications" facilities, but require entire classes of facilities (loops, transport, switches) to be unbundled without restriction.

SBC also errs in equating individual "IP-platform services" with "information services." According to SBC, "IP platform services . . . bear attributes of information services no matter what the individual application." SBC Pet. at 44. Although many IP platform services will in fact be "information services," it does not follow that all such services necessarily are information services, especially the basic transmission services included in SBC's elastic definition of what constitutes an IP platform service. Indeed, since the *Frame Relay Order* (Memorandum Opinion and Order, *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling Regarding AT&T's Interspan Frame Relay Service*, 10 FCC Rcd. 13717 (1995)), it has been settled that network facilities and services do not become "information services" simply because they use an advanced protocol. When the service "offers a transmission capability that is virtually transparent in terms of interaction with customer supplied data," the service is a basic transmission service and not an information service. *Id.* ¶ 34.

SBC suggests that all IP services are "information services" because IP networks in general have the capability of "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," 47 U.S.C. § 153(20). But the relevant inquiry is whether a *particular* service offered to consumers has that capability, not whether *other* services actually or potentially offered over the same network have the capability. *See Cable Modem Declaratory Order* ¶ 35. Indeed, the Commission makes this point in the very passage of the *Report to Congress* cited by SBC. *Report to Congress* ¶ 59 ("*If the service* can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service") (emphasis added). Indeed, if SBC were correct, then all basic transmission services would be information services because even POTS gives consumers the "capability" of reaching the public Internet.

Of course, to the extent that SBC can demonstrate that individual services that it offers are in fact information services, then, subject to dominant carrier regulation to prevent the leveraging of network level market power, SBC's services will be treated the same as other IP-application providers' services. But it would be folly – and reversible error – for the Commission to rule that all facilities and services magically attain Title I status once they are "IP-enabled." The Act and Commission precedent repeatedly distinguish between facilities and services of dominant and nondominant providers, and neither SBC nor the Commission is free to brush these distinctions aside merely by invoking the Internet.

Finally, SBC itself devastates the relief it is requesting. SBC asks the Commission to declare immediately that no regulation should apply to IP platform services pending a "rulemaking to consider whether any particular public policy mandates would be appropriate for IP platform services, including any that might be similar to those currently applied under

Title II" and to preempt any contrary state regulation. SBC Pet. at 42. SBC acknowledges, however, that the Commission has ample authority under Title I to regulate its IP platform services, and that many existing Title II regulations should ultimately be retained. The Commission cannot lawfully deregulate first and ask questions later, particularly where, as here, the proponent of deregulation admits that regulation is needed. *Farmers Union Central Exchange* v. *FERC*, 734 F.2d 1486 (D.C. Cir. 1984).

The Commission should also reject SBC's suggestion that there is an "IP-exception" to the *Computer Inquiries* rules, and instead clarify that the *Computer Inquiries* obligations extend to the IP-capabilities of incumbent LEC networks, and that incumbent LECs remain obligated to unbundle their network elements regardless of whether they use those facilities to provide information services.[43] To the extent that incumbent LECs can identify with specificity that it is technologically infeasible to "unbundle" the basic transmission capabilities used in their IP-enabled services, those claims can be addressed on a case-by-case basis and the mere possibility that such technical infeasibility may exist does not serve as a basis for eliminating altogether *Computer Inquiries* obligations.

The *Computer Inquiries* regime was enacted precisely to protect rival information services providers from anticompetitive conduct by entities that control last mile facilities necessary to provide information services. Thus, by preserving those rules that ensure equal wholesale access to broadband networks, the Commission can ensure a vibrant market for IP applications that are provided over those broadband networks.

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[43] Of course, to the extent that the ILECs are providing telecommunications services when they offer wholesale access to information service providers, that service is subject to the core requirements of Title II.

Certainly, there can be no claim that the Commission lacks authority to impose *Computer Inquiries* rules to IP-applications providers. These rules were promulgated pursuant to the Commission's Title I authority, *Computer II* ¶¶ 119-38. They applied to information services provided by facilities-based carriers, and were upheld by the courts as a valid exercise of the Commission's ancillary authority, *Computer and Communications Indus. Ass'n* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982). In fact, the Commission has been reversed by the courts only when attempting to weaken *Computer Inquiries* obligations. *California* v. *FCC*, 39 F.3d 919 (9th Cir. 1994); *California* v. *FCC*, 905 F.2d 1217 (9th Cir. 1990).

CONCLUSION

For the foregoing reasons, the Commission should adopt the regulations described above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May, 2004, I caused true and correct copies of the forgoing Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: May 28, 2004
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/s/ James P. Young

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